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Supreme Court, U.S.
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No. 92-1221

IN THE

Supreme Court of the United States

October Term, 1992

ARTHUR HIRT, ONALEE HIRT
and HOBART HIRT,
Petitioners,

vs.

CITY OF STRONGSVILLE, OHIO,
a Municipal Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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OPINIONS BELOW

On January 12, 1989, Petitioners filed a complaint for declaratory and injunctive relief, and relief under 12 U.S.C. §1983, in the Court of Common Pleas, Cuyahoga County, Ohio, against the City of Strongsville, Ohio ("City"). Petitioners sought a declaration that the zoning then existing on their property was unreasonable,

arbitrary and unconstitutional. After hearing evidence on April 16, 1990, the trial court issued its Findings of Fact, Conclusions of Law and Judgment Entry on or about June 1, 1990, wherein it held that the zoning on the property at the time of trial was invalid. The court ordered the City to enact new zoning legislation to permit the development contemplated by The National Land Development Company ("National Land"), a developer which had an interest in Petitioners' property (Petitioners' Appendix C).

On May 17, 1992, the Eighth District Court of Appeals, Cuyahoga County, Ohio, reversed and entered judgment for the City (Petitioners' Appendix B). The Court of Appeals "disagree[d]" with the trial court's conclusion that use of the property as zoned at the time of trial was not economically feasible, finding that, at most, Petitioners established their property could not be as profitably developed as National Land had hoped (Petitioners' Appendix at 6a, 10a). Consistent with longstanding precedent of this Court and of the Ohio Supreme Court, the Court of Appeals held that even if the ordinance at issue prevented the *most* profitable use of the property, such a consequence, in itself, is insufficient to invalidate the ordinance (Petitioners' Appendix at 10a). Further, in response to Petitioners' assertion that the existing zoning was unreasonable, arbitrary and confiscatory, the Court of Appeals held that "quite the contrary affirmatively appears from the record" (Petitioners' Appendix at 9a).

The Ohio Supreme Court overruled Petitioners' motion for an order directing the Court of Appeals to certify its record (Petitioners' Appendix A).

STATEMENT OF THE CASE

Petitioners own two contiguous parcels of property comprising 42.6 acres of land ("the Hirt property") in Strongsville, Ohio. The property fronts on Royalton Road (a five-lane highway), 0.7 miles to the west of an interchange with a major interstate highway (Interstate 71) (Tr. at 20, 54). At the time this action was commenced, the property was zoned RI-75, which limited development to single-family dwellings and certain public service uses (Petitioners' Appendix D). A single-family home owned by Petitioner Hobart Hirt is situated on one of the parcels comprising the Hirt property. The other parcel is vacant (Tr. at 149, Exhibit 1).

In late 1987 and early 1988, National Land, which is not a party to this action, entered into contracts to purchase the Hirt property, contingent upon it being rezoned from RI-75 to multi-family residential (Tr. at 20-21). In April 1988, National Land filed an application for a change in zoning on the property from RI-75 to the Multi-Family 1 (RMF-1) classification (Tr. at 22). National Land proposed to construct a multi-family housing and apartment complex on the property (Tr. at 22-23). Strongsville's City Council unanimously rejected the proposed zoning change ordinance at its meeting on December 5, 1988 (Tr. at 28). The complaint was filed on January 12, 1989.

On January 30, 1990, the trial court entered an agreed order finding that the RI-75 zoning, reasonable and lawful at the time the zoning was established, was no longer reasonable due to changes in land use and zoning in the area near the property (Petitioners'

Appendix D).[1] The Hirt property was rezoned to the OB (Office Building) classification on March 27, 1990 (Tr. at 167-68).

There is ample evidence in the record demonstrating that Council's decision to adopt the OB zoning classification was properly supported by relevant land use planning criteria. Council's decision was based on recommendations emanating from lengthy deliberations of various committees, boards and commissions responsible for zoning issues, and the underlying data considered by those bodies. Those deliberations had begun months before the complaint was filed.

At trial, Robert C. Hill, Strongsville's City Planner since 1960, testified that he aided in the preparation of the City's 1968 Comprehensive Master Plan, which chartered for a period of 20 years the City's future development plans (Tr. at 163-64). As early as 1972, on two occasions, Mr. Hill recommended the Hirt property be rezoned for office use (Tr. at 171).

Beginning in August 1988, Mr. Hill and other City officials reviewed the 1968 Comprehensive Master Plan and began formulating recommendations regarding how the plan should be revised and updated (Tr. at 164-65). After more than a year of review, on September 26, 1989, the Master Plan Review Committee recommended that the Hirt property be rezoned for office use (Tr. at 165-66). On December 14, 1989, the City Planning

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[1] One such change was the rezoning of a 22 acre parcel immediately east of the Hirt property to "Office Building" and the construction of a 120,000 square foot office building for the Central Reserve Life Insurance Company (Tr. at 170). In addition, longstanding plans for the building of a large shopping mall across Royalton Road and just to the east of the Hirt property had been formalized and were moving forward, as evidenced by the developers' submission of an application for development of that property (Tr. at 195).

Commission also recommended that the Hirt property be rezoned to office building use (Tr. at 167-68). These recommendations were based on relevant data submitted to the committees throughout the course of the review period (referenced in the City's trial Exhibits A-L, Tr. at 220). The Hirt property was rezoned to the OB classification in March 1990, eighteen months after review of the 1968 Comprehensive Master Plan had begun.

Mr. Hill testified that the rezoning of the property to office use was an appropriate reasonable use for that property. He concurred with Council's view that the property is located in a strategic and vital area of the City. The location of Interstate 71 to the east of the property creates the greatest potential of any area in Strongsville for a business hub (Tr. at 168-69). City officials concluded that the construction by Central Reserve Life Insurance Company of a 120,000 square foot office building headquarters to the immediate east of the Hirt property will generate and attract similar development (Tr. at 168-69).

The immediate vicinity of the Hirt property is primarily dedicated to office development, including a Kaiser Health Care facility, a bank, and an executive office park. The construction of a state-of-the-art shopping mall across the street and just to the east of the Hirt property, which development will include 385,000 square feet of office space area, also is expected to attract office building development to the Hirt property (Tr. at 168-70, 175, 180-81).

Since 1987, approximately 200,000 square feet of new office development has occurred in Strongsville—a strong indicator to City officials of the viable office market in Strongsville (Tr. 175). The Hirt property is

considered by the City planners to be on the future business corridor of Strongsville (Tr. at 179), and constitutes an attractive location for continued development of corporate office space or multi-tenant offices (Tr. at 184-85). It is the judgment of Strongsville's officials that the Hirt property is the prime area within Strongsville for significant office building development into the future (Tr. at 185).

While Strongsville's Master Plan Review Committee considered multi-family development for the Hirt property, it rejected such a use and instead recommended office use development. In addition to the other information analyzed during its review of the Master Plan, the Committee viewed the future business office development potential generated by the nearby presence of Central Reserve Life Insurance Company, as well as the availability and development of other apartment units elsewhere, as significant (Tr. at 185-86, 200).

At trial, William Gould, an architect and city planner specially hired by the City to review the Hirt property and this zoning issue (Tr. at 210), also testified. Mr. Gould explained that communities such as Strongsville develop their zoning from a master plan and that Strongsville had demonstrated a good history of planning in the past by preparing a comprehensive plan which designated the area where the Hirt property is located as the "Town Center" (Tr. at 212-13). Based on his comprehensive review and study, Mr. Gould recommended to the City that it was more appropriate to rezone the Hirt property for office use rather than multi-family development. The Hirt property is "the last large piece of undeveloped land in the Town Center area," and

for future planning of the City, office use development would be the optimal use to promote the concept of a Town Center (Tr. at 213).

Petitioners ignore the foregoing evidence in an attempt to convince this Court that the City had no basis to conclude that office use was a reasonable zoning classification for the Hirt property. The lengthy deliberation on these issues by the City Planner, the Master Plan Review Committee, the Planning Commission and City Council, and the vast experience of those persons and bodies, amply demonstrated otherwise to the Eighth District Court of Appeals.

Despite Petitioners' suggestion that they have been denied "all economically viable use of their property," the actual evidence "belies this contention" (Petitioners' Appendix at 10a).[2] Each of Petitioners' witnesses who testified on this topic admitted that their testimony was limited to the economic viability of developing a *Class A, multi-tenant, speculative office building* on the Hirt property in the near future (Tr. at 48, 83-84, 104-05).[3] None of Petitioners' witnesses testified that all other potential uses permitted under the OB classification were economically infeasible (Petitioners' Appendix at 18a-19a).

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[2] The Petition itself reveals that Petitioners have not been deprived of *all* economic use of their property. Petitioners' "Question Presented," for example, suggests denial of "the reasonable economic use of the property" (Petition at I), while elsewhere Petitioners frame this case in terms of their purported loss of "an economically viable use of the property." (*id.* at 10 n.4), or of their inability to "economically develope[ ]" the property (*Id.* at 6, 7).

[3] For example, Donald Lyden testified to the limited scope of Petitioners' presentation at trial as follows:

(Footnote continued on following page.)

There is nothing about the Hirt property that would not physically support an office building for a primary tenant (Tr. at 184-85). Appellees' witnesses also agreed that from a traditional planning perspective, office use is a reasonable use of this land (Tr. at 79).

Finally, there was no testimony or finding that the property was rendered "valueless" by reason of the zoning ordinance at issue. None of the witnesses testified about the relative market values of the Hirt property as subject to multi-family, office building, or any other zoning classification.

(Footnote continued from preceding page.)

Q. Mr. Lyden, it is your opinion then, the speculative multi-tenant Class A office facility should not be built on this piece of property; is that right?

A. Yes, sir.

Q. And your definition of a Class A building, that includes what, a fitness center?

A. Yes.

Q. Conference facility?

A. Yes.

Q. Food service?

A. Yes.

Q. You called it, I believe, a showcase property?

A. Yes.

(Tr. at 104-05).

REASONS FOR DENYING THE WRIT

I. The Issues Raised In The "Question Presented" By Petitioners Will Not Be Before The Court If Certiorari Is Granted.

The record is clear that Petitioners did not prove, nor did they attempt to prove, that the city's OB zoning classification as applied to their property denied them *all* economically viable use of the land. Nor did they attempt to show that their land was rendered valueless by reason of the OB zoning ordinance. At most, Petitioners established that the land could *most profitably* be developed with a multi-family apartment complex, and that it was not economically feasible to construct a "showcase" office building on their land. Petitioners did not establish that other uses permitted under the OB zoning classification could not be economically developed on the property. Petitioners presented no evidence whatsoever that the value of the land itself was affected—let alone adversely affected—by reasons of the adoption of the OB zoning classification by Strongsville's City Council.

For these reasons and others described below, this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. _____, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), would not have affected the manner in which the Court of Appeals analyzed the constitutionality of the ordinance at issue, nor did the announcement of that decision require the Ohio Supreme Court to review the Court of Appeals' holding. Petitioners cannot demonstrate on this record that the Court of Appeals' decision, or the Ohio Supreme Court's refusal to review that decision, was contrary to anything stated in *Lucas*.

As recognized by Petitioners (Petition at 13 n.5), *Lucas* relied on this Court's Fifth Amendment Taking Clause jurisprudence since *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), when it held that if a newly enacted land use regulation deprived a property owner of *all* economically beneficial or productive use of the land, compensation was required "without case-specific inquiry into the public interest advanced in support of the restraint." *Lucas*, 120 L. Ed. 2d at 812. If property owners cannot demonstrate that application of the challenged land use regulation rendered their property valueless, then the owners cannot take advantage of the "categorical treatment" accorded the owner in *Lucas*. In such situations, the tests articulated in this Court's regulatory takings cases, none of which were overturned by *Lucas*, continue to apply. *Id.* at 815 n.8.

This case in no manner resembles *Lucas*. First, the South Carolina Beachfront Management Act at issue in *Lucas* prohibited the building of any permanent habitable structure on Lucas' property. *Id.* at 807. Strongsville's OB zoning classification is not, of course, so severe. The Hirt property actually was up-zoned from RI-75 to OB, and the single-family home on Petitioner Hobart Hirt's property continues to be occupied.

Second, at the time Lucas purchased his land, there were no regulations prohibiting the development he envisioned for the property. *Id.* at 808. Subsequent to Lucas' purchase, the Beachfront Management Act was adopted, preventing the development activity he proposed. Here, the zoning ordinances which prohibited multi-family development were in effect since the adoption of the City's 1968 Comprehensive Master Plan, well before National Land targeted the Hirt property for development (Petition at 4-5; Tr. at 154).

Finally, it was found in *Lucas* that application of the Beachfront Management Act to Lucas' property rendered his property "valueless." *Lucas*, 120 L. Ed. 2d at 807. There is no finding in this case that application of the OB zoning classification to the Hirt property rendered that property valueless. There is simply no evidence in the record that "the last large undeveloped piece of land in [Strongsville's] town center" (Petitioners' Appendix at 9a) is devoid of any value—including all market value and resale potential—as was the case with Lucas' property. *Lucas*, 120 L. Ed. 2d at 824 (Kennedy, *J.*, concurring).

Lucas reaffirmed that if a property owner suffers less than a total loss of economically productive use of his land, then the test of constitutionality articulated in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), continues to apply. *Lucas*, 120 L. Ed. 2d at 815 n.8. The *Penn Central* test is the basis of the Ohio rulings, challenged here by Petitioners, requiring owners contesting the constitutionality of a zoning regulation to "demonstrate . . . that the zoning classification denies them the economically viable use of their land without substantially advancing a legitimate interest in the health, safety, or welfare of the community" in order to prevail. *Columbia Oldsmobile, Inc. v. Montgomery*, 56 Ohio St. 3d 60, 62, 564 N.E.2d 455, 457 (1990), *cert. denied*, 115 L. Ed. 2d 1022 (1991); *Karches v. Cincinnati*, 38 Ohio St. 3d 12, 19, 526 N.E.2d 1350, 1357 (1988). *See Penn Central, supra*, 438 U.S. at 125 ("in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that

destroyed or adversely affected recognized real property interests.") (citations omitted). *See also Agins v. Tiburon*, 447 U.S. 255, 260-61 (1980) ("Although no precise rule determines when property has been taken, . . . the question necessarily requires a weighing of private and public interests.") (citation omitted); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391 (1926).

As noted, the Eighth District Court of Appeals held that the OB zoning ordinance did not deny Petitioners the economically viable use of their land and that the ordinance substantially advanced legitimate government interests (Petitioners' Appendix at 6a, 9a-10a). The court also held that " '[t]he mere fact that one's property can be put to a more profitable use does not, in itself, establish' " the owners' entitlement to relief (Petitioners' Appendix to 10a).[4] Because the Court of Appeals properly applied the well-settled legal standards employed in this Court and by Ohio courts for decades to determine the constitutionality of zoning ordinances, and because *Lucas* did not modify that settled law in cases in which the economic impact on the property is less than total, the announcement of the *Lucas* decision did not create the need for the Ohio Supreme Court to review the Court of Appeals' ruling, and certiorari need not be granted here.

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[4] This holding is consistent with *Penn Central, supra*, in which it was confirmed "that diminution in property value, standing alone, can[not] establish a 'taking.' " 438 U.S. 104 at 131; *See also Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

II. This Is Not An Appropriate Case To Address The Issue Presented.

The Petition should also be denied because Petitioners ask this Court to render an advisory opinion.

Petitioners seek for this Court to instruct the Ohio Supreme Court how it should rule if it ever considers a case in which owners pray for damages for the denial of the use of their property occasioned by application of a zoning ordinance which advances legitimate government interests. As established above, that question cannot be considered on this record, given that Petitioners have not established the "elimination of economic usefulness" which is the foundation of the question they present.

The issue raised in Petitioners' "Question Presented" has not been squarely before the Ohio Supreme Court since this Court's ruling in *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304 (1987), in which it was held that a landowner must receive compensation if a land use regulation deprived the owner of all use of its property, even if the deprivation was temporary. *Id.* at 318. The Ohio Supreme Court did recognize in *Karches, supra,* that *First English* may have entitled the property owners to damages "for the taking that occurred before the ordinance was invalidated" in that case, but this issue was not considered because the property owners had not appealed the trial court's denial of their claim for damages. 38 Ohio St. 3d at 21, 526 N.E.2d at 1359. It is instructive, however, that the Ohio Supreme Court did not rely on any of the cases cited in the Petition to reject summarily the viability of such a claim.[5]

[5] Contrary to Petitioners' assertion, the Ohio Supreme Court has recognized that land use regulations may affect a taking if the regulations go too far. *See, e.g., State ex rel. Killeen Realty Co. v.*

(Footnote continued on following page.)

Finally, the Ohio Court of Appeals' cases cited at page 15 of the Petition failed to award compensation to the landowners not because there was no "physical intrusion," as Petitioners suggest, but because no "takings" had occurred under well-settled principles applied consistently with this Court's decisions.[6]

(Footnote continued from preceding page.)
East Cleveland, 169 Ohio St. 375, 380, 160 N.E.2d 1, 5 (1959) ("*At some undefinable point, regulation of property shades into taking of property*, which must be compensated. . . .' "); *Negin v. Board of Bldg. and Zoning Appeals*, 69 Ohio St. 2d 492, 497, 433 N.E.2d 165, 169 (1982) ("The rendering of such a lot useless for any practical purpose [by application of a zoning ordinance] goes beyond mere limitation of use and becomes a confiscation."); *McKee v. Akron*, 176 Ohio St. 282, 285, 199 N.E.2d 592, 594 (1964) ("Physical displacement is not always necessary. A taking may also be found where it is clear that the injury sustained by a person differs substantially in kind from that sustained by others in the neighborhood, even though there has been no physical displacement."), *overruled on other grounds, Haverlack v. Portage Homes, Inc.*, 2 Ohio St. 3d 26, 442 N.E.2d 749 (1982).

There is nothing to indicate that the Ohio Supreme Court, when it directly considers the question posited here by Petitioners, would ignore *First English's* directive to award compensation for the temporary period of time, prior to judicial invalidation, during which an unconstitutional regulation burdened the property, or for the permanent taking which would result if the government refused to change the regulation after it is found to be unconstitutional.

[6] *See State, ex rel. Pitz v. Columbus*, 56 Ohio App. 3d 37, 41-42, 564 N.E.2d 1081, 1086 (Franklin County 1988) (court recognized that there "need not be physical taking . . . or even dispossession" in order for a "taking" to have occurred, but decline in market value, standing alone, is "not enough to constitute a 'taking' which would require compensation"), *juris. denied*, 41 Ohio St. 3d 729 (1989); *Miller v. PPG Indus.*, 48 Ohio App. 3d 20, 23, 547 N.E.2d 1216, 1219 (Pickaway County 1988) (owner's third assignment of error, which alleged that the trial court erred when it found that a land use regulation "which decreases land value is not a 'taking' under . . . the Ohio Constitution," overruled); *In re Leas*, 5 Ohio App. 3d 120, 123, 449 N.E.2d 780, 784 (Jefferson County 1981) ("Proof that [owner's] property was damaged is not in itself enough to entitle her to compensation").

CONCLUSION

This is a traditional zoning dispute in which the Petitioners asserted in the trial court that their property had been unduly burdened by the land use legislation at issue, and sought to have that legislation declared unconstitutional. Petitioners did not establish that their land was rendered valueless by reason of the zoning ordinance, or that they were deprived of all economic use of the property. Thus, the Eighth District Court of Appeals properly employed a balancing test in which diminution of the value (or profit potential) of the property was relevant but not controlling, and in which the strength of the public purpose underlying the ordinance was considered. Such an approach is fully consistent with this Court's jurisprudence on this subject. It is respectfully submitted, therefore, that the petition for writ of certiorari should be denied.

Respectfully submitted,

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